IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. 96.

R. M. POWELL et al.,
Petitioners,

vs.

THE UNITED STATES CARTRIDGE COMPANY,
a Corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF OF RESPONDENT.

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THE OPINION BELOW.

The District Court filed no opinion. The opinion of the Court of Appeals is printed in the Record (R. 982-1006) and reported in 174 F. (2d) 718.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 7, 1949 (R. 1037-9). The petition for certiorari was filed on June 3, 1949 and granted on October 10, 1949. The jurisdiction of this Court is invoked under Section 1254 of the Revised Judicial Code (28 U. S. C. 1254).

QUESTIONS PRESENTED.

1. Did the coverage of the Fair Labor Standards Act extend to those who, during the recent war, were engaged in the production of munitions at Government-owned ordnance plants operated through the agency of private contractors by authority of the National Defense Act of July 2, 1940?

2. Were such persons engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act?

3. Were such persons "employees" within the meaning of the Fair Labor Standards Act?

STATUTES INVOLVED.

The statutes involved are the Walsh-Healey Public Contracts Act of June 30, 1936 (c. 881, 49 Stat. 2036; 41 U. S. C. Sec. 35, et seq.), the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Sec. 201, et seq.), and the National Defense Act of July 2, 1940 (c. 508, 54 Stat. 712, 50 U. S. C. App., Secs. 1171, 1172, and 5 U. S. C., Sec. 189 [a]). In the interest of brevity reference is made to Appendix A of the Brief of Respondent in the companion case of *Aaron et al. v. Ford, Bacon & Davis, Incorporated*, No. 79, October Term, 1949, where the pertinent statutory provisions will be found.

STATEMENT.

In order that this Court may understand the case presented by the present record, it will be necessary to disregard entirely the incomplete and misleading Statement which appears in the Brief for Petitioners.

The Government has intervened as *amicus curiae* in this case as well as in *Cruel v. Lone Star Defense Corporation*, No. 58, October Term, 1949, and *Aaron v. Ford, Bacon & Davis*, No. 79, October Term, 1949, and has filed a consolidated brief in which the statements are made that the "salient facts * * * are concededly substantially similar in all three cases"; and, "The contracts, employment relationships and method of operations in all three cases were substantially the same. The three records together afford a complete and representative picture of the operations and relationships." With these statements we are in complete agreement. However, the Summary Statement of Facts which appears in the Government's brief is not much more satisfactory than the Statement which appears in petitioners' brief in the present case. The explanation is that the author of the Government's brief has attempted to construct a synthetic case, first, by dipping into all three records and extracting from them certain facts which create an impression favorable to petitioners' claims, and, second, by quoting extracts from a publication (not to be found in any of the three records) which sets forth at length the conclusions of the writer on certain questions which are before this Court for decision. Accordingly, we find it necessary to restate the salient facts so as to present a truer picture of the operation of the St. Louis Ordnance Plant, which is typical, not only of similar operations at the Arkansas Ordnance Plant and the Lone Star Ordnance Plant, which are involved in the two companion cases, but also the more than one hundred

similar operations undertaken by the Ordnance Department preparatory to and during World War II.

The Proceedings Below.

This suit was begun by the filing of a complaint in the United States District Court for the Eastern District of Missouri on May 4, 1945 (R. 2). By leave of court, an amended complaint was filed on April 5, 1946 (R. 3-29), on which the cause was tried. This amended complaint alleged that the respondent was engaged in operating a munitions plant for the manufacture of small arms ammunition, all of which was used by the military forces of the United States and its allies in the prosecution of the war. It was alleged that petitioners were employees of respondent who, while employed at respondent's plant, were engaged in interstate commerce and in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938. Petitioners claimed that they were employed as safety men at agreed salaries for a forty hour work week and that each of them was required to work overtime for which they had received no compensation. They claimed overtime pay at the statutory rate, liquidated damages, and attorneys' fee.

In respondent's answer, filed April 18, 1946, respondent alleged that the complaint failed to state a claim upon which relief could be granted; denied generally all allegations not specifically admitted, but admitted that petitioners had been employed by it for the periods stated in the complaint; denied that it was engaged in interstate commerce or in the production of goods for interstate commerce; denied that petitioners were employed in the production of goods for interstate commerce; denied that petitioners were employed at agreed salaries for a 40 hour week; and denied that petitioners were entitled to be paid

for all overtime worked in excess of 40 hours per week; alleged that each of the petitioners was employed in a bona fide administrative capacity and hence that the provisions of the Act did not apply with respect to petitioners, or any of them; and affirmatively alleged that none of the petitioners was engaged in commerce or in the production of goods for commerce within the meaning of the Act (R. 30-32).

Thereafter petitioners filed interrogatories to which respondent filed sworn answers (R. 33-42). Petitioners also filed a request for the admission of certain facts to which respondent replied, admitting some and declining to admit others (R. 45-48). The case was then heard in open court, without a jury, where the testimony of numerous witnesses was taken and voluminous exhibits introduced in evidence. Counsel for petitioners and respondent filed extensive briefs discussing numerous points of law.

On May 19, 1947, the trial court filed written findings of fact and conclusions of law and entered a judgment for petitioners in the aggregate amount of $246,251.44 plus $24,625 attorneys' fees and costs (R. 916-922). On May 29, 1947, respondent filed its motion for new trial. Respondent called the attention of the trial court to the fact that the Portal-to-Portal Act of 1947 had become law five days prior to the filing of the findings of fact and conclusions of law and alleged that the intervening time had been insufficient in which to call the court's attention to the provisions of the Act and to certain facts which were set forth in affidavits attached to the motion which respondent believed were sufficient to show that the Act required a modification of the court's findings and conclusions (R. 923-945). On September 2, 1947, the trial court entered an order overruling respondent's motion for new trial (R. 959). Respondent filed a notice of appeal

from the final judgment of the trial court and the order denying the motion for a new trial (R. 1).

The case was first argued before the Court of Appeals prior to the announcement of the opinion of this Court in *Kennedy v. Silas Mason Co.*, 334 U. S. 249 (1948). After that case had been decided, the Court of Appeals set aside the submission of the present case and set it for reargument before the Court *en banc*. The parties were granted leave to file supplemental briefs "particularly directed to the applicability, if any, of either the Fair Labor Standards Act of 1938 * * *; the Act of July 2, 1940 * * *; or the Walsh-Healey Public Contracts Act * * *" (R. 984). On reargument, all seven judges of the Eighth Circuit concurred in reversing the judgment of the trial court.

Two opinions were filed. Six judges concurred in the opinion delivered by Judge COLLET, and three judges, besides joining in the Court's official opinion, concurred also in the separate concurring opinion written by Judge JOHNSEN.

Petitioners thereupon filed their petition for a writ of certiorari, stating that the questions presented were as follows:

> "1. Are the Fair Labor Standards Act and the Walsh-Healey Act mutually exclusive?
>
> "2. Are the Fair Labor Standards Act and the Walsh-Healey Act so divergent that both may not apply at the same time on the same project?
>
> "3. Did the National Defense Acts of June 28, 1940, and of July 2, 1940, or any executive action taken thereunder suspend or exclude the operation of the Fair Labor Standards Act in the St. Louis Ordnance Plant?

"4. Did the Act of July 2, 1940, set up a complete scheme of labor relations at the St. Louis Ordnance Plant exclusive of the Fair Labor Standards Act?

"5. Were the munitions manufactured at the St. Louis Ordnance Plant for interstate shipment 'goods,' and were they 'produced for commerce,' within the meaning of the Fair Labor Standards Act?

"6. Whether petitioners while working in the Safety Department of the St. Louis Ordnance Plant were within the coverage of the Walsh-Healey Public Contracts Act, and, if so, were they for that reason excluded from the Fair Labor Standards Act?

"7. Were petitioners while so employed within the coverage of the Fair Labor Standards Act?"

On October 10, 1949, this court entered an order granting the writ and assigning the case for hearing along with *Creel et al. v. Lone Star Defense Corp.*, No. 58, October Term, 1949, and *Aaron et al. v. Ford, Bacon & Davis*, No. 79, October Term, 1949.

Findings of Fact.

The Findings of Fact of the trial court, dealing mainly with the details of petitioners' claims (R. 916-19) set forth nothing but conclusions with respect to the coverage and applicability of the Fair Labor Standards Act (R. 916-17). Nor is any help to be gotten from the Conclusions of Law filed by the trial court, for they were confined to the bare statements "that at all times referred to in the evidence herein, defendant was engaged in commerce and in the production of goods for commerce and was an employer within the meaning of the Fair Labor Standards Act of 1938," and "that during their respective periods of employment plaintiffs and each of them were engaged in

the production of goods for commerce within the meaning of said Act" (R. 919). No opinion of the trial court elucidated these conclusions.

Faced with this situation, the Court of Appeals undertook to make findings of its own (R. 986-990). But, as the reversal of the judgment of the trial court was based solely on the ground that Congress intended the Walsh-Healey Act to apply rather than the Fair Labor Standards Act, the findings do not cover certain facts which this Court should have before it in considering the important issues raised by the petition for a writ of certiorari.

The St. Louis Ordnance Plant and Its Operation.

The St. Louis Ordnance Plant was erected by the United States Government just prior to the United States' entry into World War II. The Western Cartridge Company was employed by the United States, by a contract dated the 5th day of December, 1940, designated W-ORD-481 (Defendant's Exhibit 22, R. 722-753) to furnish certain management service in connection with the construction of the plant and the procuring and installation of equipment (R. 718-719). This contract contained on its face the statement:

> "This contract is authorized by the following laws: Act of July 2, 1940 (Public No. 703, 76th Cong.)."

The respondent, The United States Cartridge Company, a wholly owned subsidiary of the Western Cartridge Company (R. 707), was employed by the United States by a contract also dated the 5th day of December, 1940, designated W-ORD-491 (Defendant's Exhibit 20, R. 761-795), and certain supplements thereto (including Defendant's Exhibits 23, 24 and 25, R. 804-823, 825-833, 836-837), to operate the St. Louis Ordnance Plant on a cost-plus-a-fixed-fee basis.

This contract W-ORD-491 also contained on its face the statement (R. 763):

> "This contract is authorized by the following laws: Act of July 2, 1940 (Public No. 703, 76th Cong.)."

Supplement No. 7 (Defendant's Exhibit 23), which was dated the 3rd day of June, 1942, contained on its face the statement (R. 805):

> "This contract is authorized by the following laws: The Act approved December 18, 1941 (Pub. Law 354—77th Cong.) and Executive Order No. 9001 dated December 27, 1941."

Under the terms of this contract the respondent was employed to render certain services in connection with the operation of said plant, all as more specifically described in the contract. All work was done at the risk of the United States (R. 786), and the Government bore all costs and expenses of every character and description incurred by the respondent under the contract (R. 771). The funds with which these costs and expenses were paid were advanced by the Government to the respondent (R. 413, 438, 777), and kept in a special account separate and apart from other funds of the respondent (R. 438-439, 779-780).

Although the respondent was designated in the contract as an "independent contractor," nevertheless the extent and character of the work to be done by the respondent was subject to the approval of the Government's representative, the Contracting Officer (R. 786), as were the respondent's records and accounts (R. 788) and organization and methods (R. 791). The Contracting Officer had the right at any time and from time to time to make changes in or additions to the work, or to direct the omission of work covered by the contract (R. 792), and this right

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was exercised (R. 801-837). The Government also reserved the right to order the discharge of employees (R. 782). All disputes concerning questions of fact arising under the contract were to be decided by Government representatives whose decision was final (R. 791). For its services under the contract it was agreed that the respondent should receive fixed fees, based upon the number of rounds of ammunition of the different classes produced at the plant (R. 770).

Contract W-ORD-491 contains representations and stipulations pursuant to the Walsh-Healey Act (R. 783, 785), and the applicability of the Walsh-Healey Act was reaffirmed in Supplement No. 11 (R. 825). Nowhere in the contract, nor in any of the supplements, was there any reference to the Fair Labor Standards Act, or any indication that it was deemed to apply.

The St. Louis Ordnance Plant, land, buildings, machinery, tools and equipment was, at all times, owned by the United States of America (R. 713). All raw materials, work in process and rounds of completed ammunition were, at all times, owned by the United States of America (R. 713-716, 786, 860-862).

Some of the raw materials were furnished to the St. Louis Ordnance Plant by the United States Government, having been manufactured or purchased elsewhere and outside of the State of Missouri by the Government and shipped into the plant on a free-issue basis. Thus all of the smokeless powder (R. 440), some of the brass (R. 412, 413, 415, 425) and other raw materials, were manufactured or acquired by the Government and shipped in to the St. Louis Ordnance Plant. Some of the brass and other raw materials were purchased by The United States Cartridge Company (R. 412-440). The purchase orders, each containing a specific reference to the fact that it

was issued under the provisions of Contract W-ORD-491 (R. 708-711), covering each such purchase by the respondent of raw materials, and everything else that was purchased by the respondent during the operation of the plant, were first approved in writing by the Contracting Officer's Representative (R. 437), and each purchase was paid for with funds advanced by the Government. All raw materials received at the St. Louis Ordnance Plant were checked in by a representative of the United States Government, an officer of the Ordnance Department in the Property Accountability Office, along with respondent's employees (R. 439, 862). Records were kept of all such raw materials all the way through, which were Government records. The respondent never kept records of its own of raw materials, work in process or the finished products (R. 862).

All ammunition produced at the St. Louis Ordnance Plant, which was transported across State lines, was shipped by the United States of America, at Government expense, on Government bills of lading (R. 346), in which the United States Government, or some agent of the Government, was the consignee (R. 362-379). These shipments by the Government were made for the uses and purposes of the Government in connection with the prosecution of World War II (R. 380, 383).

When actual manufacturing operations at the St. Louis Ordnance Plant ceased, all physical property on hand, including machinery, tools, appliances, raw materials, supplies, work in process and finished ammunition, if any, was turned over to the Ordnance Department, and the respondent obtained a receipt and release from the Government for all such property on hand (R. 862).

The St. Louis Ordnance Plant, the land and buildings, which constituted a military reservation, together with all machinery, tools, equipment, raw materials, work in

process and completed ammunition, were, at all times, in the possession, charge and control of a Commanding Officer, a member of the United States Army, stationed at and with his office within the St. Louis Ordnance Plant. The Commanding Officer was assisted in the performance of his duties by a large staff of Army officers and other Government representatives, inspectors, clerical and other employees, with their offices and performing their duties in the St. Louis Ordnance Plant, all under the direction, supervision and control of the Commanding Officer (R. 437-439, 635, 636). This was done pursuant to the authority of Ordnance Procurement Instructions, issued by direction of the Chief of Ordnance pursuant to authority conferred upon him by the War Department Procurement Regulations.[1]

These Ordnance Procurement Instructions set out in considerable detail the policies and procedures to be followed in "general matters concerning the administration of cost-plus-a-fixed-fee contracts," including such matters as the duties of Commanding Officers and Contracting Officer's Representative (50,002-50,002.14), the maximum salary to be paid any employee (50,066.1), the preliminary preparations for the administration of such a contract (50,030-50,034), the setting up of the field office, "in the same building or in the immediate vicinity of the quarters of the contractor's staff" (50,060-50,071), the method to be followed in the making of all purchases (50,100-50,108.2), the reports to be made and records to be kept (50,200-50,202.2), the policies to be followed in the interpretation of such contracts (50,250-50,261.2). Specific instructions were given with respect to the handing of funds (51,200-51,211.2),

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1 These Ordnance Procurement Instructions were given wide public circulation and may be found in the services published during the war by Commerce Clearing House, Inc., and the Prentice-Hall Corporation. Excerpts from these instructions are printed in the record in the Aaron case (S. R. 76-78, 163-164). The Court may take judicial notice of such regulations. Standard Oil Co. v. Johnson, 316 U. S. 481, 483-484 (1942).

auditing (52,000-52,302), every aspect of the problem of accounting for government-owned property (53,000-53,203.2), the formation of Ordnance Department Industry Integration Committees, whereby not only parts, materials, tools, machines, etc., but also knowledge, experience and skill, were to be interchanged between different contractors, with assurance against anti-trust law prosecution (56,000-56,222), plant security, wherein the statement is made that "Government-owned contractor operated plants are miliary reservations. Commanding officers appointed by War Department orders were responsible for the safety of all personnel and government property" (57,000-57,201.7). They also covered the procedures to be followed in disposing of government-owned property (7,100-7,905), the payment or non-payment of various Federal, State and local taxes (8,000-8,500), every aspect of labor relations, including the employment policies to be followed, the fixing and changing of wage rates and obtaining government approval therefor, the negotiation of collective bargaining agreements and obtaining government approval therefor, the payment of overtime and wage and salary stablization (9,000-9,303.3), and, finally, the procedure to be followed in the event the contract should be terminated for the convenience or at the option of the Government (15,111-15,987.1).

Much additional light will be thrown upon the exact nature of the operations at the St. Louis Ordnance Plant, and upon similar ordnance plants operated by the Small Arms Division of the Ordnance Department by an examination of Small Arms Ammunition, a History of an Industry, two volumes, published by the Ammunition Branch, Small Arms Division, Office of Chief of Ordnance, in which it is stated, Volume I, page 1:

"This report proposes to present the complete general story of the Ordnance Department's small arms

ammunition activities in the times of peace following World War I, ... he defense just prior to World War II, and during the all-out war period of 1941 to 1944."

This report discloses how the Ordnance Department, in the Government's own Frankford Arsenal, over a period of years, developed every step in the manufacturing process of small arms ammunition, embodied the information thus obtained, with detailed drawings and specifications, in Descriptions of Manufacture, which were furnished to the operators of each of the Government-owned contractor-operated ordnance plants making small arms ammunition, of which the St. Louis Ordnance Plant was the largest (pages 65, 74, 75, 78, 79); how the Ordnance Department developed all the key facts with respect to each operation on every current type of ammunition to be manufactured, embodied the same in an Operations Control Manual, which was likewise furnished to each such operator (page 80); and how the Ordnance Department also developed every step of the inspection processes and procedures necessary in connection with the production of small arms ammunition, embodied the same in a Standard Inspection Procedure Quality Control, which was likewise furnished to each of such operators (pages 339-341). Not only were the operators required to follow and comply with the various procedures thus prescribed, but the personnel of the operating contractors whose duty it was to carry out the instructions thus given were taken to Frankford Arsenal and trained by the Government to that end. Thus it was said (pages 76-77):

"The contract signed by * * * the Western Cartridge Company stipulated that personnel for these plants could be trained, if so desired by the contractor, at the Government arsenals.

"Since Frankford Arsenal was the logical place for training such personnel, the program was established there. * * *

"The plan was prepared in conjunction with the liaison representatives of * * * the Western Cartridge Company. On 21 April, 1941, the first trainees from each of these facilities arrived at Frankford Arsenal and were assigned to their positions * * *. The average length of the training course was approximately six months * * *. In all, the Arsenal trained approximately eight hundred persons either in supervisory or production work."

Finally, the method of administration by the Ordnance Department of these ordnance plants is described at considerable length (pages 101 et seq.), in the course of which it is pointed out (pages 109-110), that in the exercise of "executive and administrative control" the Office of the Field Director of ammunition plants exercised specific functions with respect to plant administration, plant design and maintenance, technical and quality control over loading and assembly, technical and control units for powder and explosives, safety and security.

As stated in Plaintiffs' Exhibit C-3, with respect to the St. Louis Ordnance Plant, "The United States Cartridge Company is the operating agent" (R. 191); and again "The United States Cartridge Company is merely managing the plant for the Federal Government" (R. 204). The wage rates were determined by the Ordnance Department of the United States (R. 203), and periodic wage surveys were conducted by the United States Government to maintain sound wage rates (R. 206).

The St. Louis Ordnance Plant was not leased to the respondent by the terms of Contract W-ORD-491, nor was the respondent otherwise put into "possession" of it, or of the raw materials, work in process or the finished parts, since such possession cannot be read into said contract (R. 762, et seq.).

Scrap brass created at the St. Louis Ordnance Plant as a by-product in the manufacture of ammunition was shipped, on commercial bills of lading, from the plant to the Western Cartridge Company at East Alton, Illinois, by trucks, which would pick up the scrap brass at the receiving docks at the various manufacturing units (R. 356-358). No petitioner testified, and there was no evidence to indicate that any of the petitioners in the course of their duties had anything to do, directly or indirectly, with the production or shipment of the scrap brass, the title to which, when produced and shipped, was in the United States Government (R. 786).

The St. Louis Ordnance Plant commenced regular production operations in November, 1941, and continued in operation until August, 1945. Petitioners were employed at different times in connection with the operation of said Ordnance Plant. During the times involved in this action they were all paid on a salary basis, and were paid no overtime.

Only three of the petitioners testified in petitioners' case (R. 62-342, 384-393, 395-411, 451-456), and only eight of the petitioners testified, very briefly, in rebuttal (R. 874-906). These eleven petitioners identified themselves as having been employees in the Safety Department of the respondent, but the other forty-eight petitioners did not testify.

Correction of Errors.

In the Brief for Petitioners the statement is twice made (pages 2 and 3) that the present suit was brought while the petitioners were still employed at the St. Louis Ordnance Plant. We fail to see the significance of this statement, but the fact is that, at the time the suit was filed, forty-seven of the fifty-nine petitioners were no longer employed by the respondent (R. 7-29).

In the Brief for Petitioners (page 2) the statement is made that the St. Louis Ordnance Plant operated on a forty-eight hour work week pursuant to Executive Order No. 9301, promulgated February 9, 1943, and that it was by virtue of this Order that the petitioners were required to work a six day week. The purpose of this statement is apparently to bring into the case the mention of the Fair Labor Standards Act in Paragraph 5 of the Order. The fact is that, as disclosed by the petitioners' own testimony, the St. Louis Ordnance Plant operated on a forty-eight hour work week from the very beginning of its operations, and long before the promulgation of Executive Order No. 9301 (R. 401-403, 7, 300, 302, 8, 332, 140-181).

In the Brief for Petitioners (page 5) the statement is made that because the contractor was required to load the ammunition on cars or other carriers, in accordance with the Government's shipping instructions, the ammunition did not come into the actual physical possession of the Government prior to arrival at destination. The fact is, of course, that upon completion of the manufacturing processes the ammunition was accepted by the Ordnance Department of the United States Army (R. 36); after being so accepted it was, upon specific orders of the United States Government, loaded on to cars and the cars were sealed under supervision of the United States Army (R. 344, 347); thereupon Government bills of lading were prepared by either Government employees or respondent's employees pursuant to shipping orders issued by the Commanding Officer of the St. Louis Ordnance Plant (R. 346, 360), signed by the Transportation Officer of the United States Army (R. 361), and one copy delivered to the carrier (R. 361). The typical Government bill of lading would provide for billing to the "War Department, Finance Officer, U. S. Army, Washington, D. C."; the consignor would be an officer of the Ordnance Department

of the United States Army; and the consignee would be the Commanding Officer of an Ordnance Depot (R. 365). Clearly, the undisputed facts in the case show that, in any event, the ammunition did come into the actual physical possession of the Government and before intrastate transportation commenced.

In the Brief for Petitioners the statement is made (page 8) that the production of waste brass was interwoven with the production of the bullets, and hence all employees necessary to the production of bullets were also necessary to the production of waste brass. If, by this is meant that waste brass was produced through various steps of the manufacturing process, the statement is not correct. The fact is that the waste brass was produced in the very first step of the manufacturing process when "the strip brass is fed into the blank and cup machine which stamps out round disks of metal and forms these disks into cups, in one operation * * *" (Plaintiffs' Exhibit D, R. 379-381—not printed in full in the Record). What is left of the strip brass after this initial operation is the scrap brass referred to in the evidence. None of the petitioners testified to the rendering of any services in connection with either the initial manufacturing operation or the production of scrap brass.

In the Brief for Petitioners the statement is made (pages 8-9) that the statement in the opinion below to the effect that the title to the waste brass appears to have remained in the Government, is not supported by any evidence in the Record. The fact is that the evidence shows that all raw materials and work in process were at all times owned by the Government, and there was no exception of any kind with respect to scrap brass (R. 713-716, 786, 860-862).

In the Brief for Petitioners the statement is made (page 24) that the "petitioners were not shown to be within the

purview of the Walsh-Healgy Act, and that the issue was not tried in the District Court." The fact is that the undisputed evidence in the Record, including that of those of the petitioners who testified, clearly shows that they were within the purview of the Walsh-Healey Act (with the possible exception of a few of the petitioners who occupied executive positions higher than that of inspectors or safety engineers), and that the issue as to the applicability of the Walsh-Healey Act was squarely presented to and tried in the District Court (R. 1044-1053).

In the Brief for Petitioners (page 25) the statement is made that "In the District Court respondent did not plead the Walsh-Healey Act as a defense." It was, of course, not necessary to plead this Act by name.

ARGUMENT.

The arguments which follow are made with the full approval of the Department of the Army.

Foreword.

As indicated above, the consolidated Brief for the United States as Amicus Curiae presents an unsatisfactory Summary Statement of Facts selected from portions of the records in all three cases, which is highly confusing and somewhat misleading. It was felt by counsel for the respondents in all three cases that it would only add to the confusion to file a single Consolidated Brief for Respondents, and that a separate Brief for Respondent should be filed in each of the three cases.

However, it is recognized that there is no difference in certain general principles of law equally applicable to all three cases, and that it would place an unnecessary burden upon the Court and add unnecessary expense, ultimately to be borne by the Government, to repeat the argument on these general principles in each of three separate Briefs.

Accordingly, the argument on such general principles will be found only in the Brief of Respondent in the case of *Aaron v. Ford, Bacon & Davis, Incorporated*, No. 79, October Term, 1949. In the argument to follow in this Brief there will be appropriate cross references to the argument in the Brief of Respondent in that case, supplemented by such further argument as may be required by reason of the variation as to details in the facts of the two cases and in the questions presented.

The reason why the argument on these general principles applicable to all three cases is made in the Brief

of Respondent in the case of *Aaron v. Ford, Bacon & Davis, Incorporated*, is that, as pointed out above, there were no detailed findings of fact by the trial court in the present case, or any findings of fact in the case of *Creel v. Lone Star Defense Corporation*, whereas detailed findings of fact were made by an experienced trial judge in the Aaron case, and not disturbed by the Court of Appeals, which findings should relieve this Court of the necessity of searching through thousands of pages of the Records in three cases in order to arrive at the "salient facts".

Summary of Argument.

Petitioners contend that they were engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act. Respondent contends that when the Fair Labor Standards Act is read in the light of the system of Government Contract Laws, and particularly the Walsh-Healey Act, which were in force and effect at the time the Fair Labor Standards Act was enacted, and in the light of the laws subsequently enacted, pursuant to which the St. Louis Ordnance Plant was erected and operated, and when the nature of that operation is clearly understood, it necessarily follows that the petitioners were not engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act, and were not included within the coverage of that Act. As will more fully appear below, this general proposition is not only sound in principle, but finds direct support in an overwhelming majority of the decisions of the various United States Courts of Appeal, United States District Courts, and State Courts.

These decisions are based upon one or more, in varying combinations, of the following general principles of law,

each of which are discussed more fully in the Brief of Respondent in the case of *Aaron v. Ford, Bacon & Davis*, and supplemented to a limited extent below:

I.

The National Defense Act of July 2, 1940, set up a wholly new system of war production which was completely outside the scope of the Fair Labor Standards Act.

II.

The Walsh-Healey Act applied to employees of the St. Louis Ordnance Plant to the exclusion of the Fair Labor Standards Act.

(a) The Fair Labor Standards Act was never intended to cover employees working under Government contracts.

(b) The National Defense Act of July 2, 1940, excluded the operation of the Fair Labor Standards Act.

III.

The petitioners were not engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

(a) The shipment by the Government across State lines of Government-owned munitions of war, manufactured and shipped solely for war purposes, is not "commerce" within the meaning of the Fair Labor Standards Act.

(b) Government-owned munitions of war are not "goods" within the meaning of the Act.

IV.

The petitioners were employees of the United States within the meaning of the Fair Labor Standards Act.

In addition to the foregoing general principles applicable to all three cases, there are the following applicable only to the present case:

V.

The shipments of scrap brass from the St. Louis Ordnance Plant do not bring petitioners within the coverage of the Fair Labor Standards Act.

VI.

In addition to the questions presented to this Court by the Petition for Writ of Certiorari, there were a number of other questions presented to and not decided by the Court of Appeals below which should be decided in the event the decision of the Court below is reversed.

Argument.

I.

The National Defense Act of July 2, 1940, Set Up a Wholly New System of War Production Which Was Completely Outside the Scope of the Fair Labor Standards Act.

In the interest of brevity, this respondent adopts the Argument on this point which will be found under Point II of the Argument, pages 25-44, of the Brief of Respondent in the case of *Aaron v. Ford, Bacon & Davis*, No. 79, October Term, 1949.

II.

The Walsh-Healey Act Applied to Employees of the St. Louis Ordnance Plant to the Exclusion of the Fair Labor Standards Act.

(a) The Fair Labor Standards Act was never intended to cover employees working under Government contracts.

In the interest of brevity, this respondent adopts the Argument on this point which will be found under Point III (a) of the Argument, pages 44-55, of the Brief of Respondent in the case of *Aaron v. Ford, Bacon & Davis*, No. 79, October Term, 1949.

Supplementing what is said there, it should be noted that in the Brief for Petitioners, Point II of the Argument, pages 23-26, it is contended that petitioners were not shown to be within the coverage of the Walsh-Healey Act, and that the issue was not tried in the District Court. As we have already pointed out, this question was specifically presented to the District Court (R. 1044-1053).

Furthermore, the Record clearly shows that the petitioners (with the possible exception of a few who occupied executive positions higher than that of inspectors or safety engineers) were clearly within the coverage of the Walsh-Healey Act. Their duties were summarized in the Job Description (Defendant's Exhibit 13—R. 596-599), where it is shown that 30% of the time of the inspectors or safety engineers was spent in regular inspections of the property in the areas to which they were assigned, inspecting machinery, lighting, floors, exits and storage of materials; that 40% of their time was spent in checking manual movements of employees, pointing out unsafe practices to their superiors; and that an additional 5% of their time was spent seeing that injured employees

received first aid. They were thus engaged "in the manufacture or furnishing of the materials, supplies, articles or equipment used in the performance of the contract" and the regulations promulgated pursuant to the provisions of the Walsh-Healey Act provide, in general terms, that:

> "All employees (except those in bona fide executive, administrative, or professional capacities, and office, custodial and maintenance employees) who, after the date of the award, are engaged in any operation preparatory or necessary to or in the performance of the Government contract are subject to the Act."[2]

In an attempt to bring petitioners within the exceptions, it is suggested that they might be classed as "office" or "custodial" employees. But the regulations provide that the exclusion of office employees refers to those who are:

> "engaged exclusively in office work relating generally to the operation of the business and not engaged in the production of the materials, supplies, articles or equipment required by the Government contracts."[3]

And it has been specifically ruled that clerical office employees

> "will be considered subject where their duties are a part of the production process."[4]

And it has also been ruled that the custodial employees who are exempt are those

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2 Rulings and Interpretations No. 3, U. S. Department of Labor, October 1, 1945, § 35 (a-b), p. 18.

3 Rulings and Interpretations No. 3, U. S. Department of Labor, October 1, 1945, § 39 (b), p. 23.

4 Public Contracts Division Special Opinion February 8, 1945, Prentice-Hall Wage and Hour Service, Volume 1, Par. 13142.4.

> "whose duties are directed to the maintenance of the plant and who do not perform work on the commodities required by the Government * * *."[5]

The fact that a Government contractor who is himself clearly subject to the provisions of the Walsh-Healey Act may have one or more employees who are not subject to the Act, will not defeat the force of the arguments presented on this point in the case of *Aaron v. Ford, Bacon & Davis*. If it was the intention of Congress in enacting the Walsh-Healey Act to use the purchasing power of the Government to require certain minimum labor standards in the field of Government contracts, and if in enacting the Fair Labor Standards Act Congress intended to provide

> "that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows"[6]

the mere fact that isolated employees, or groups of employees, of a Government contractor might not come within the Walsh-Healey Act would not operate to make the Fair Labor Standards Act overlap or even apply pro tanto.

The case of *Brooks v. United States*, 338 U. S. ..., 93 L. Ed. 884, decided May 16, 1949, is cited in the Brief of Petitioners in the present case and also in the Government's Consolidated Brief in support of the proposition that the Walsh-Healey Act was not intended to exclude the application of the Fair Labor Standards Act. In that case this Court did hold that the provisions of the veter-

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[5] Rulings and Interpretations No. 3, U. S. Department of Labor, October 1, 1945, § 39 (c), p. 23.

[6] United States v. Darby, 312 U. S. 100, 115.

ans' laws do not preclude an action under the Tort Claims Act by a serviceman for an injury not incident to his military service. However, the Court did say, l. c. 886:

> "Were the accident incident to the Brooks' service, a wholly different case would be presented. We express no opinion as to it, but we may note that only in its context do Dobson v. United States (CCA 2d N. Y.), 27 F. (2d) 807; Brady v. United States (CCA 2d N. Y.), 151 F. (2d) 742; Jefferson v. United States (DC Md.), 77 F. Supp. 706, have any relevance."

In the cases referred to recovery for service connected injuries had been denied upon substantially the same principle as that for which we are now contending. And this Court further clearly implied that the amount of the payments under the veterans' laws should be applied to reduce the damages allowable under the Tort Claims Act, saying, l. c. 887:

> "we now see no indication that Congress meant the United States to pay twice for the same injury."

So in the present case there is no indication that Congress intended the United States to pay, under the Fair Labor Standards Act, time and one-half overtime, plus an equal amount as liquidated damages, when it had approved the sums paid in the first instance, and caused them to be paid out of funds advanced by it.

Finally, in the Brief for Petitioners (pages 34 and 35), the contention is made that the ultimate liability for liquidated damages and attorneys' fees claimed in this litigation must be borne by the respondent and not by the United States. Apparently it is recognized that Congress could not have intended to impose such liability under the Fair Labor Standards Act upon the Government, but it is implied that a different rule of law would apply if this

liability could be imposed upon a private contractor alone. However, this argument has been disposed of by the United States in its Consolidated Brief, where in the introduction to the Summary of Argument it is specifically admitted that "petitioners' claims, if they ultimately succeed, will be paid by the Government."

(b) The National Defense Act of July 2, 1940, excluded the operation of the Fair Labor Standards Act.

In the interest of brevity, this respondent adopts the Argument on this point which will be found under Point III (b) of the Argument, pages 55-61, of the Brief of Respondent in the case of *Aaron v. Ford, Bacon & Davis*, No. 79, October Term, 1949.

III.

The Petitioners Were Not Engaged in the Production of Goods for Commerce Within the Meaning of the Fair Labor Standards Act.

(a) The shipment by the Government across state lines of Government-owned munitions of war, manufactured and shipped solely for war purposes, is not "commerce" within the meaning of the Fair Labor Standards Act.

(b) Government-owned munitions of war are not "goods" within the meaning of the Act.

In the interest of brevity, this Respondent adopts the Argument on this point which will be found under Point IV (a) and (b) of the Argument, pages 61-80, of the Brief of Respondent in the case of *Aaron v. Ford, Bacon & Davis*, No. 79, October Term, 1949.

Supplementing what is said there, it should be noted that, in the present case, the trial court made no finding on

the question of the actual physical possession of the raw materials, work in process or finished ammunition. In the course of the opinion of Judge Collet in the Court of Appeals there appears the statement: "Defendant manufactured those raw materials into arms and ammunition at the plant in Missouri. In doing so it had the actual physical possession of the material and products thereof but all operations were under the direct supervision of representatives of the United States Government."

In the first place, it will be observed that this finding as to possession is limited to possession during the manufacturing operations. The Court of Appeals did not undertake to find, and upon the record could not find, that the ammunition did not come into the actual physical possession of the ultimate consumer, i. e., the United States Government, when it accepted the completed ammunition and caused it to be loaded on freight cars at the plant and then to be shipped by the Government, on Government bills of lading, at Government expense, to Government military installations, to be used in the prosecution of World War II.

Even if the ammunition did not come into the actual physical possession of the Government until all manufacturing operations had been completed, nevertheless the ammunition clearly was, before leaving the plant, in the actual physical possession of the Government. It follows that the ammunition at the time of transportation in interstate commerce was in the "actual physical possession of the ultimate consumer thereof" within the meaning of Section 3 (i) of the Act, and, accordingly, such ammunition did not constitute "goods" within the meaning of the Act. And if the ammunition did not constitute "goods" within the meaning of the Act, the manufacture of such ammunition could not constitute "the production

of goods for commerce" within the meaning of those words as used in Sections 6 and 7 of the Act.

In the second place, and considering only the question of possession during the process of manufacture, since there was no finding by the trial court on this point, and the Court of Appeals placed its decision on grounds which made any finding on this point unnecessary, this Court is not bound by the statement of the Court of Appeals; and may, of course, examine the facts in the record and determine for itself whether or not the raw materials and work in process were in the actual physical possession of the Government, within the meaning of the Act. There is no conflict in the testimony on this point. The facts disclosed by such testimony have already been pointed out above in the Statement (pages 9-17), and need not be here repeated.

Disregarding the vastness of the operation and reducing the transaction to simple terms, the relationship of the respondent to the St. Louis Ordnance Plant and the operations carried on there was comparable to the relationship which a general manager, works manager, production manager, or any similar official, by whatever title he be known, would have to any plant under his supervision. Respondent was employed by the Government to operate the plant for and at the expense and risk of and pursuant to the direction and control of the Government, and was paid a fee for its services in so doing. The respondent no more had legal "possession" of the St. Louis Ordnance Plant or of the materials, supplies and ammunition produced therein, than any general manager has of a plant which he is operating. As stated in Plaintiffs' Exhibit C-3 (R. 204): "The United States Cartridge Company is merely managing the plant for the Federal Government." At the most, respondent had the "care" or "custody" of

such materials, supplies and ammunition during the process of manufacture, but the Government at all times had "possession."

The distinction between custody and possession is well recognized and of long standing. A vast number of cases could be cited in which this distinction is recognized and discussed, but a few should be sufficient. *Gibson v. St. Paul Fire & Marine Insurance Co.*, 184 S. E. (West Va.) 562; *Shipp v. Patton*, 93 S. W. (Ky.) 1033; *Tripp v. United States Fire Ins. Co.*, 44 Pac. (2d) (Kansas) 236.

On similar facts other Courts have found that the Government had actual physical possession not only of the products of such plants upon completion of the manufacturing processes, but of the raw materials, component parts and work in process while the manufacturing operations were actually going on. *Divins v. Hazeltine Electronics Corp.*, 70 F. Supp. 686 (S. D. N. Y. 1946), aff. 163 F. (2d) 100 (2 Cir. 1947); *Kennedy v. Silas Mason Co.*, 164 F. (2d) 1016 (5 Cir. 1948), reversed on other grounds 334 U. S. 249 (1948); *Crabb v. Welden Bros.*, 164 F. (2d) 797 (8 Cir. 1947); *Lynch v. Embry-Riddle Co.*, 63 F. Supp. 992 (D. C. Fla. 1945); *Anderson v. Federal Cartridge Corp.*, 72 F. Supp. 644 (D. C. Minn. 1947).

IV.

The Petitioners Were Employees of the United States Within the Meaning of the Fair Labor Standards Act.

In the interest of brevity, this respondent adopts the Argument on this point which will be found under Point V of the Argument, pages 80-93, of the Brief of Respondent in the case of *Aaron v. Ford, Bacon & Davis*, No. 79, October Term, 1949.

Supplementing what is said there, it should be noted that both the Brief for Petitioners in the present case and the Brief for the United States as Amicus Curiae make much of the fact that respondent's answer contains the admission "that plaintiffs, and each of them, were employed by the defendant for the period stated" in the first amended complaint (R. 30). Apparently it is contended that because of this admission respondent is not now in a position to urge that, in the operation of the St. Louis Ordnance Plant, it was not acting as an independent contractor, but as an agency of the United States, and that petitioners are barred by the provisions of Section 3 (d) of the Act, which excludes the United States as an employer.

That petitioners had been hired by the respondent, and were, respectively, on respondent's payroll for the periods alleged in the complaint, could not, and cannot now be denied. But these facts, standing alone, are not determinative of the question, and the admission in the answer was not intended to be, and should not be construed as, an admission with respect to the ultimate legal effect of these and all other facts which must be taken into consideration in determining the relationship between the United States and the petitioners within the meaning of the Fair Labor Standards Act.

In the same answer respondent not only pleaded that the complaint "fails to state a claim against the defendant upon which relief can be granted" (R. 30), but denied the allegations that defendant "was subject to the provisions of the Fair Labor Standards Act of 1938" (R. 5), and that petitioners "were and are subject to the provisions, and entitled to the benefits and protection of the Act and particularly Sections 6 and 7 thereof." Further, respondent affirmatively alleged that "none of the plain-

tiffs was engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938 or the definition of such terms as contained in the said Act, and hence the provisions of said Act do not apply to the plaintiffs or any of them" (R. 31). Under these pleadings the defense that the United States was the "employer" was and is available.

In this connection we also point out that all of the evidence which would establish the fact that the United States was the "employer" of the petitioners within the meaning of the Fair Labor Standards Act was offered and received in evidence without objection, a large part of the evidence having been offered on behalf of the petitioners themselves, and that, therefore, the issue was tried by the express or implied consent of the parties within the meaning of Rule 15 (b) of the Rules of Civil Procedure.

It is respectfully submitted that the admission did not touch upon the relationship of the Government to the St. Louis Ordnance Plant, the respondent and the petitioners; that, despite the admission in the pleadings, this defense is available to respondent; and that, upon the undisputed facts in this case, the United States was the "employer" of the petitioners within the meaning of the Fair Labor Standards Act.

V.

The Shipments of Scrap Brass From the St. Louis Ordnance Plant Do Not Bring Petitioners Within the Coverage of the Fair Labor Standards Act.

Petitioners contend that even though the ammunition produced at the St. Louis Ordnance Plant may not have been produced for commerce, within the meaning of the Act, nevertheless certain waste brass was a by-product of the manufacture of ammunition, and that the shipment of

this waste brass to the respondent's parent corporation, Western Cartridge Company, at East Alton, Illinois, constituted interstate commerce so as to bring petitioners within the coverage of the Act. There are at least two fallacies in this contention.

In the first place, the title to such scrap brass was no different than the title to every bit of raw material and work in process which was at any time in the plant. It was in the Government, and, whether shipped on Government bill of lading or on private bill of lading, the shipment was a shipment of Government-owned property incident to the production of military ammunition, made only with the consent and approval of the Government acting through its Contracting Officer (R. 833), and, as already pointed out above, shipments of munitions of war, in time of war, for war purposes, do not constitute commerce within the meaning of the Fair Labor Standards Act.

In the second place, the evidence fails to show that the petitioners, or any of them, devoted any time whatsoever to the rendering of services in connection with that portion of the manufacturing operations which produced scrap brass. Only three of the petitioners testified in petitioners' case (R. 62-342, 384-393, 395-411, 351-456); and only eight testified very briefly in rebuttal (R. 874-906). Not one of them mentioned scrap brass, or the manufacturing operation which produced scrap brass, and the testimony of some of the petitioners clearly showed that they could not have rendered any services in connection with the production of scrap brass (R. 874, 876, 878, 883, 885, 886, 906).

The burden was, of course, upon petitioners to prove not only that they were engaged in the production of goods, as the term "goods" is defined in the Act, but that the

production of such goods was for interstate commerce.[7] And in this connection it should be borne in mind that the question as to whether or not an individual employee is engaged in the production of goods for commerce depends upon the activities of that particular employee, and not the activities of the employer.[8]

Accordingly, if the petitioners were engaged in the production of goods for both intrastate commerce and interstate commerce, and rely upon the production of scrap brass as constituting the production of goods for interstate commerce, then the burden was upon petitioners to prove that a substantial portion of their time was devoted to work within the protection of the Act.[9]

In the present case there was not only no evidence as to the portion of petitioners' time devoted to the production of scrap brass, there was no evidence that any time whatsoever was devoted to such production by any of the petitioners.

Accordingly, the fact that scrap brass was shipped from the St. Louis Ordnance Plant to East Alton, Illinois, will not serve to bring petitioners within the Act, because such scrap brass was owned by the Government, and its shipment did not constitute commerce, and not one of the petitioners has in any way connected himself with the production of said scrap brass, much less shown what portion of his time was devoted to such production.

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7 Warren Bradshaw Co. v. Hall, 317 U. S. 88; Schulte, Inc., v. Gangi, 328 U. S. 108.

8 Kirschbaum Co. v. Walling, 316 U. S. 517; McLeod v. Threlkeld, 319 U. S. 491.

9 Maitrejean v. Metcalfe Construction Co., 165 F. (2d) 571; Skidmore v. John J. Casale, Inc., 160 F. (2d) 527; Cody et al. v. Dossin's Food Products Co., 156 F. (2d) 678; Walling v. Mutual Wholesale Food & Supply Co., 141 F. (2d) 331, 339; Schwarz v. Witwer Grocer Co., 141 F. (2d) 341, cert. denied 322 U. S. 753; Guess v. Montague, 140 F. (2d) 500, 504; Davis v. Goodman Lumber Co., 133 F. (2d) 52; Super-Cold S. W. Co. v. McBride, 124 F. (2d) 90.

VI.

In Addition to the Questions Presented to This Court by the Petition for Writ of Certiorari, There Were a Number of Other Questions Presented to and not Decided by the Court of Appeals Below Which Should Be Decided in the Event the Decision of the Court Below Is Reversed.

As pointed out in the opinion below, other issues were presented to the Court of Appeals besides those relating to the applicability and coverage of the Fair Labor Standards Act. These other issues were stated in the opinion of Judge Collet as follows (R. 985):

> "Defendant contends * * * (6) that plaintiffs were employed in a bona fide administrative capacity and were exempt from the provisions of the Fair Labor Standards Act, (7) that the judgment of the trial court is in any event excessive in that it (a) is based on the erroneous assumption that the salaries paid plaintiffs were base pay for a 40-hour week instead of a variable or 48-hour week, (b) includes in the computations of hours worked a one-half hour lunch period, and (c) includes as hours worked, time prior to the beginning of and following the ending of plaintiffs' regular work shifts, (8) that the claims of certain plaintiffs were barred by Sections 1012 and 1015, R. S. Mo. 1939, (9) that the provisions of the Portal-to-Portal Act of 1947 are binding in this case and defendant should have been given the opportunity to plead and sustain the defenses made available to it under the Act, and (10) that two of the plaintiffs died while the cause was under submission and there has been no proper substitution and revival."

Since the Court of Appeals held that petitioners could not maintain an action under the Fair Labor Standards Act,

it was not necessary, and the Court of Appeals did not undertake, to pass upon any of these other issues before it. If, therefore, the decision of the Court of Appeals should be reversed, the cause should be returned to that Court for consideration and decision of these other issues.

CONCLUSION.

In conclusion, we submit that employees such as the petitioners, employed at the St. Louis Ordnance Plant, owned by the Government, engaged in the production, at Government expense and under Government direction, supervision and control, of military ammunition also owned by the Government, and shipped by the Government across state lines, were not engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act, and were not included within the coverage of that Act. It is immaterial whether this proposition be sustained on the basis of one or more or all of the principles outlined above in Points I to IV, inclusive. The result is the same and requires that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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